GRANT HOWE

IBLA 80-948 Decided July 20, 1981

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, approving a color-of-title application in part. NM 25456.

Affirmed.

1. Color or Claim of Title: Generally -- Color or Claim of Title: Adverse Possession

An applicant under the Color of Title Act, 43 U.S.C. § 1068 (1976), for a patent of Federal land must establish peaceful adverse possession of the land claimed. Where a tract of public land is divided by a fence in place for 40 years, which marks the limit of claimant's possession, his claim is properly limited to the land on the side of the fence which he has occupied and improved.

APPEARANCES: Grant Howe, pro se.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This is an appeal by Grant Howe from a decision of the New Mexico State Office, Bureau of Land Management (BLM), approving in part appellant's application for a patent of land under the Color of Title Act, 43 U.S.C. § 1068 (1976). Appellant brings this appeal from that decision because it approved for patent less acreage than was requested in his application.

Howe filed a class 1 color-of-title application NM 25456 with BLM on April 24, 1975, for lot 14 of sec. 31, T. 29 N., R. 13 E., New Mexico principal meridian, Taos County, New Mexico. Howe is fee owner of small holding claim No. 2024, which lies contiguous to and immediately north

of lot 14. Howe's neighbor, Eli Rael, occupies lot 15, which is contiguous to and immediately south of lot 14. Rael had previously made application (NM 19648) under the Color of Title Act for a patent to lots 14 and 15. 1/ Thus, there were conflicting applications filed by Howe and Rael for the 0.39-acre parcel constituting lot 14. Simultaneously with issuance of the decision on appeal, BLM issued a related decision approving Rael's color-of-title application as to lot 15 and that part of lot 14 not approved for patent to appellant. Rael has not appealed.

Each party established chain of title by deed to at least part of lot 14. Each holds color of title to land bounding on the land occupied by the other. Upon investigation and survey, BLM discovered the boundary between the land occupied by claimants was marked by a fence running along the south of Howe's and the north of Rael's property. That fence, which has been in place for over 40 years, longer than the parties have had possession of their lands, divides lot 14. On the portion of lot 14 lying on his side of the fence, Howe has made permanent additions to his home and has also built a shed.

In a memorandum to BLM dated March 8, 1976, the Field Solicitor, Santa Fe, stated in part:

> It is apparent both Mr. Rael and Mr. Howe intended that the fence line would be the boundary of the tracts. Under these circumstances, the north boundary of lot 14 should be reestablished as a line corresponding to the boundary intended by the parties. It is my opinion that both Mr. Rael and Mr. Howe established color of title to the respective portions of lot 14 to be determined by the actual survey line of the fence.

A new survey, accommodating the fence line, has resulted in the redesignation of the original lot 15 (containing 4.19 acres) as lot 20, which, by absorbing part of lot 14, now contains 4.46 acres. The original lot 14 (containing 0.39 acre) has been redesignated as lot 19, containing 0.12 acre.

Appellant states on appeal:

> I do not agree with the amount of land involved. My deed is for a frontage of 186 feet and you are deeding 14 feet of my property to Mr. Rael * * *. The original Application for Color-of-Title that I * * * [filed] included .39 acre and that should have included this 14 feet of land * * *, but now the Color-of-Title Application I [am] told to file only shows .12 acre, just barely going around a home on the property.

1/ Rael first applied for patent to lots 14 and 15 in Oct. of 1973, but patent had not issued by the time Howe filed his conflicting application.

The Color of Title Act, 43 U.S.C. § 1068 (1976), states in part:

> The Secretary of the Interior (a) shall, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation * * * issue a patent for not to exceed one hundred and sixty acres of such land upon the payment of not less than $1.25 per acre * * * And provided further, That no patent shall issue under the provisions of this chapter for any tract to which there is a conflicting claim adverse to that of the applicant, unless and until such claim shall have been finally adjudicated in favor of such applicant.

The issue raised by this appeal is whether appellant can establish a color-of-title claim to land which the record discloses he was not occupying. Clearly, he cannot.

[1] A class 1 claimant under the Color of Title Act must establish the elements of adverse possession including actual, exclusive, continuous, open, and notorious possession of the land. Lawrence E. Willmorth, 32 IBLA 378, 382 (1977). For 40 years the fence has delimited the apparent domain of the neighbors' rights in the land as well as their physical possession thereof. To accommodate the fact that Howe had in his possession all the land on his side of the fence, BLM resurveyed and approved his application for 0.12 acre of land which he occupied. This land has now been redesignated as lot 19 and approved for patent. Since Howe had no more than 0.12 acre in his possession, the Act will allow him to receive no more under patent.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Edward W. Stuebing
Administrative Judge